FILED

97 2026 JUN 15 1998

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF ARIZONA,
PETITIONER,

-vs-

WILLIAM LEE BRANHAM,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL
(FIRM STATE BAR NUMBER 1400)

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JACQUELYN B. ESKAY
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

30 pp

QUESTION PRESENTED FOR REVIEW

Did the Arizona Court of Appeals err, as a matter of federal constitutional law, in holding that an arresting officer, who has stopped a driver for a traffic violation, is not justified in conducting a *restricted or limited* search for proof of ownership of the vehicle unless the driver's failure to produce proof of ownership is coupled with other factors giving rise to probable cause that the vehicle is stolen or involved in some other criminal activity?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASON WHY THE WRIT SHOULD ISSUE 7

CONCLUSION 13

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

CASES — PAGE

Camara v. Municipal Court
387 U.S. 523 (1967) 8

Cardwell v. Lewis
417 U.S. 583 (1974) 9

Coolidge v. New Hampshire
403 U.S. 443 (1971) 8

Cooper v. California
386 U.S. 58 (1967) 8

Delaware v. Prouse
440 U.S. 648 (1979) 8, 9, 11

Florida v. Royer
460 U.S. 491 (1983) 10

Jackson v. Superior Court
142 Cal.Rptr. 299 (Cal. 1977) 7, 12

Katz v. United States
389 U.S. 347 (1967) 8

Marshall v. Barlow's, Inc.
436 U.S. 307 (1978) 8

Michigan v. Summers
452 U.S. 692 (1981) 10

New York v. Class
475 U.S. 106 (1986) 5, 7, 8, 9, 10, 11, 12

People v. Judge of Seventh Dist. Court
222 N.W.2d 778 (Mich. Ct. App. 1970) 11

People v. Reyes
499 N.Y.S.2d 321 (N.Y. Sup. Ct. 1983) 7, 12

South Dakota v. Opperman
428 U.S. 364 (1976) 8, 9

State v. Boykins
232 A.2d 141 (N.J. 1967) 7, 9, 12

State v. Branham
952 P.2d 332 (Ariz. 1997) 11

State v. Byrd
209 S.E.2d 516 (N.C. App. 1974) 7, 9, 12

State v. Halstead
414 A.2d 1138, n.14 (R.I. 1980) 7, 12

State v. Moore
659 P.2d 70 (Haw. 1983) 11

Taylor v. State
421 S.W.2d 403 (Tex.Cr.App. 1967) 11

Terry v. Ohio
392 U.S. 1 (1968) 10

State v. Patino
414 A.2d 1327 (1980) 7

United States v. Chadwick
433 U.S. 1 (1977) 8

United States v. Martinez-Fuerte
428 U.S. 543 (1976) 8, 12

United States v. Mendenhall
446 U.S. 544 (1980) 12

United States v. Miller
84 F.3d 1244 (10th Cir. 1996) 7, 12

United States v. Place
462 U.S. 696 (1983) 10

United States v. Ramsey
431 U.S. 606 (1977) 8

United States v. Sharpe
470 U.S. 675 (1985) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 2
U.S. Const. amend. IV 3, 8, 9, 11
U.S. Const. amend. XIV 3

STATUTES

A.R.S § 13-2158(C) 5
28 U.S.C. § 1254 2

RULES

Rule 10.1, Rules of Supreme Court 2

OTHER AUTHORITIES

3 W. LAFAVE, SEARCH & SEIZURE:
A TREATISE ON THE FOURTH AMENDMENT
§ 9.2 (1978) 10

OPINION BELOW

On December 23, 1997, the Arizona Court of Appeals issued its published opinion reversing and remanding the trial court's ruling denying Respondent's motion to suppress evidence. A copy of the Arizona Court of Appeals' opinion is at Appendix A. The Arizona Supreme Court denied review of Petitioner's petition for review. A copy of the order denying the petition for review is at Appendix B. A copy of the Arizona Court of Appeals' order and mandate reversing and remanding is at Appendix C.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a writ of certiorari issue to review the decision of the Arizona Court of Appeals' holding that police officers are not justified in conducting a limited search of a vehicle for proof of registration unless the search is supported by probable cause; that is failure to provide registration coupled with other factors providing probable cause that the car is stolen or involved in criminal activity. (Appendix A.) The Arizona Court of Appeals issued its opinion on December 23, 1997. The Arizona Supreme Court denied the Petitioners' petition for review on March 17, 1998. (Appendix B.) Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254; and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Untied States Constitution provides, in pertinent part:

No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Procedural History of the Case

On April 12, 1996, the State of Arizona charged Respondent by information with possession of dangerous drugs, a class 4 felony. Respondent filed a motion to suppress the evidence, alleging that the evidence produced was the result of an illegal search of Respondent's vehicle in violation of his constitutional rights. At the conclusion of the hearing on the motion to suppress, the trial court denied the motion, and made the following findings:

> It seems to me that if I went and stole a car and then got stopped for speeding while driving that car and the police officer asked me for driver's license, registration and insurance, I might give him my driver's license, but I wouldn't show him the registration and insurance because it's going to show somebody else's names [sic] that I've never heard of before. Therefore, the rule of law that says a police officer can conduct a limited search for the purpose of finding evidence of registration is reasonable, and it appears that that's exactly what Officer Johnson did in this case. I find no abuse of that process.

After the trial court denied the motion to suppress, the case proceeded to jury trial.[1] The jurors returned a guilty verdict for possession of dangerous drugs. The trial court placed Respondent on three years probation.

On appeal, Respondent challenged the legality of the search of the automobile, and the admissibility of the evidence obtained during the search. On December 23, 1997, the Arizona Court of Appeals held that the search was not supported by probable cause under the automobile exception and reversed Respondent's conviction. The court of appeals remanded to the trial court for a determination of whether a valid consent justified the search.

---

1. Respondent's first trial ended in a mistrial because the jurors were unable to reach a verdict.

Petitioners petitioned the Arizona Supreme Court for review. Petitioners presented the following issue for review:

> Did the Arizona Court of Appeals wrongly hold that failure to provide valid registration as required by [Arizona statute] is insufficient alone to justify a limited police search for the registration in areas in which such registration may be kept?[2]

Petitioners further argued that this case was similar in nature to the case of *New York v. Class*, 475 U.S. 106 (1986), where this Court concluded that "a demand to inspect the VIN, *like a demand to see license and registration papers*, is within the scope of police authority pursuant to a traffic violation stop." 475 U.S. at 115. The Court balanced the nature of the intrusion against the governmental interests used to justify the intrusion and concluded that the search was permissible because of the importance of highway and officer safety and because "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective." *Id.* at 118. On March 17, 1998, the Arizona Supreme Court denied review.

Facts of the Case

At the suppression hearing, Officer Lane Johnson testified that while on patrol at 4:45 a.m., he noticed a 1983 blue Pontiac Firebird speeding. Officer Johnson stopped the Firebird and contacted the driver, Respondent. Respondent identified himself to Officer Johnson with his Arizona driver's license. Officer Johnson asked Respondent for the vehicle registration and proof of insurance. Officer Johnson twice instructed Respondent to search for the registration, and after two searches through the car, Respondent was unable to provide registration or proof of insurance. Officer Johnson asked Respondent and his wife to step out of the car so he could "help him out" and look for it. Respondent answered, "Okay."

---

2. Arizona Revised Statute § 13-2158(C) provides:

> The registration card shall be carried at all times in the driver's compartment of the vehicle for which it is issued. The registration card is subject to inspection by the director, members of the highway patrol or any peace officer.

Officer Johnson explained that the particular model of Firebird involved does not have a glove box but a folding pocket, and a center console with the gearshift. Officer Johnson further explained that often when the registration is not kept in the side pocket, it is kept inside the center console. In Respondent's car, there were papers stuffed into a broken section of the gearshift box right in front of the console. Officer Johnson looked through the papers, but did not find the registration. However, in the hollow portion of the broken gearbox, he noticed several vials and containers containing a brown crystal substance, plastic scales, and other drug paraphernalia. At that point, Officer Johnson seized the items and read Respondent his *Miranda* rights. Respondent told Officer Johnson that he did not know what kind of drugs were in the vials and containers, that he did not know to whom they belonged, and that he did not want to talk about it. Tests later proved that the substance was 11 grams of methamphetamine.

REASON WHY THE WRIT SHOULD ISSUE

This Court should grant the petition for writ of certiorari because the Arizona Court of Appeals has decided an important federal question in a way that conflicts with the decisions of this Court, of federal circuit courts of appeal, and other states that recognize that if an operator of a vehicle is stopped for a traffic violation and is unable to produce registration, it is not unreasonable for the officer to enter the vehicle to conduct a *limited* search for registration after making reasonable attempts to procure registration, including an inquiry as to the whereabouts of the registration prior to entry. In particular, the Arizona Court of Appeals has adopted the minority position that the inability to produce a registration certificate will justify a limited search of the vehicle *only* in those limited circumstances where other evidence coupled with the failure to produce registration provides probable cause to believe that the car is stolen or involved in some other criminal activity. Arizona and its minority confuse the limited search exception with a full-blown probable cause search under the automobile exception.

The position that police officers are not justified in conducting a limited search for registration after failure to produce registration conflicts with the principles set out in *New York v. Class*, 475 U.S. 106, 115-16 (1986); *United States v. Miller*, 84 F.3d 1244, 1251 (10th Cir. 1996); *Jackson v. Superior Court*, 142 Cal.Rptr. 299, 302–03 (Cal. 1977) (officer may enter a vehicle to check on registration after first inquiring as to location of registration slip before entering to obtain it); *State v. Boykins*, 232 A.2d 141, 143 (N.J. 1967) (failure to produce proof of registration justified officer's search for evidence of ownership)[3]; *People v. Reyes*, 499 N.Y.S.2d 321, 323 (N.Y. Sup. Ct. 1983) (failure to comply with rules governing ownership of automobiles diminished expectation of privacy and gave police a reasonable basis to further inspect the vehicle); *State v. Byrd*, 209 S.E.2d 516, 517 (N.C. App. 1974) ("[a] traffic violation as such will justify a search for things related to it. So . . . if the operator is unable to produce proof of registration, the officer may search the car for evidence of ownership. . . ."); *State v. Halstead*, 414 A.2d 1138, 1149 n.14 (R.I.

---

3. *Boykins* is the landmark case setting out the majority position. This case was later refined in *State v. Patino*, 414 A.2d 1327 (1980), holding that the search for evidence of ownership must be "confined to the glove compartment or other area where a registration might normally be kept in a vehicle. . . ."

1980) (Fourth Amendment rights not violated when police look for evidence of ownership following failure to provide proof of registration).

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977). The Fourth Amendment does not require that every search be made pursuant to a warrant. *South Dakota v. Opperman*, 428 U.S. 364, 372–73 (1976) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 509–10 (1971) (Black, J., concurring and dissenting)). "The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances." *Opperman*, 428 U.S. at 372–73; *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)) (the purpose of the Fourth Amendment is to impose standard of reasonableness upon the exercise of government intrusion). The reasonableness of a search and seizure depends on the facts and circumstances of each case. *Cooper v. California*, 386 U.S. 58, 59 (1967). The permissibility of a particular government practice is judged by balancing the intrusion of Fourth Amendment interests against its promotion of legitimate government interests. *United States v. Ramsey*, 431 U.S. 606, 616–19 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

"A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). However, a state's intrusion into a particular area, whether in an automobile or elsewhere, does not result in a Fourth Amendment violation unless the area is one in which there is a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). It so happens that the physical characteristics of an automobile and its use result in a *lessened expectation of privacy* therein. *Class*, 475 U.S. at 112.

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.

Cardwell v. Lewis, 417 U.S. 583, 590 (1974). In addition, automobiles are justifiably the subject of pervasive regulation by the State. *Opperman*, 428 U.S. at 368.

> States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle. The registration requirement and, more pointedly, the related annual inspection requirement . . . are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are essential elements in a highway safety program.

Prouse, 440 U.S. at 658. Thus, a motorist must assume that such regulation will on occasion require the state to determine the vehicle identification number (VIN), licenses, and registration of the vehicle, and the individual's reasonable expectation of privacy in those areas where these items might be found is diminished. *See Class*, 475 U.S. at 113; *Prouse*, 440 U.S. at 659; *Cardwell*, 417 U.S. at 588–90.

> The foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained.

Prouse, 440 U.S. at 659.

Thus, not every traffic violation will justify a search of every part of the vehicle. However, a traffic violation as such will justify a search for things related to it. *Class*, 475 U.S. at 114–16; *Boykins*, 232 A.2d at 143; *Byrd*, 209 S.E.2d at 517. The fact that a driver of a vehicle cannot immediately produce the vehicle's registration or proof of insurance supports a *reasonable suspicion* that the vehicle is stolen. *Id.* That suspicion justifies a police officer in conducting a limited warrantless search of areas in the vehicle where such papers might normally be kept

by an owner. This is not contrary to the Fourth Amendment of the United States Constitution and such exercise demonstrates a valid exercise of state police power in furtherance of the state's legitimate interest. *Id.* Under the circumstances of this case, the search was reasonable and justified.

This Court set out the crucial test for judging the constitutionality of limited intrusions in *United States v. Sharpe*, 470 U.S. 675 (1985). The test is "[w]hether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain [or search] the defendant." *Sharpe*, 470 U.S. at 686; *see also United States v. Place*, 462 U.S. 696, 709 (1983) ("in assessing the effect of the length of detention, we take into account whether the police diligently pursued their investigation"); *Florida v. Royer*, 460 U.S. 491, 500 (1983) ("The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."); *Michigan v. Summers*, 452 U.S. 692, 701 n.14 (1981) ("[t]he reasonableness of a detention may be determined in part by 'whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon.'") (quoting 3 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2 at 40 (1978)). The "diligence and necessary" test for determining the constitutionality of a *Terry*-type[4] police intrusion was reiterated in *Class* and applied to searches for a VIN, registration papers, license, and proof of insurance. 475 U.S. at 115, 18–19. In *Class*, this Court stated that a driver does not have a reasonable expectation of privacy in a VIN, especially when a driver has committed a traffic violation. 475 U.S. at 113–14. The court further concluded that "a demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop." *Id.* at 115. The Court balanced the nature of the intrusion against the governmental interests that justified the intrusion and concluded that the search was permissible because of the importance of highway and officer safety and because "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective." *Id.* as 118. In sum, the Court held:

---

4. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) (in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, justifiably warrant that intrusion).

> that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations. Any other conclusion would expose police officers to potentially grave risks without significantly reducing the intrusiveness of the ultimate conduct—viewing the VIN—which, as we have said, the officers were entitled to do as part of an undoubtedly justified traffic stop.

Id. at 119.

Arizona and its minority require that a limited search for proof of ownership must be supported by probable cause in all circumstances. The minority view holds that a limited search for registration papers as part of a justified traffic stop is reasonable *only* when the operator's failure to produce registration coupled with some other factors gives rise to probable cause that the vehicle is stolen or involved in some other criminal activity. *State v. Branham*, 952 P.2d 332, 336 (Ariz. 1997); *State v. Moore*, 659 P.2d 70 (Haw. 1983) (entry into the vehicle was necessary to inspect the VIN; because the entry was not justified by probable cause or reasonable suspicion that the vehicle was involved with a crime, the entry was unlawful); *People v. Judge of Seventh Dist. Court*, 222 N.W.2d 778, 781 (Mich. Ct. App. 1970) (where the officer did not have probable cause that the car was stolen, search could not be validated even though the driver had been arrested for nonpossession of a registration certificate); *Taylor v. State*, 421 S.W.2d 403, 406 (Tex.Cr.App. 1967) (requiring failure to provide proof of registration coupled with other factors giving rise to probable cause before a search for registration is justified).

However, failure to produce registration papers combined with other factors giving rise to probable cause to search is not the test for determining whether a limited search for registration papers is justified. Arizona and its minority have misconstrued the reasonableness test and the requirements for a *restricted or limited* search following a traffic violation and failure to produce evidence of ownership. It remains that it is not unreasonable for a law enforcement officer that has stopped a driver for a traffic violation, who is unlicensed or unable to produce registration, to conduct a limited search for proof of ownership. *Class*, 475 U.S. at 114–16; *Prouse*, 440 at 662–63. This search is reasonable under the Fourth Amendment.

Therefore, it is clear that a driver's inability to produce registration, gives rise to reasonable suspicion that the car is stolen. *Byrd*, 209 S.E.2d at 517; *Boykins*, 232 A.2d at 143. This suspicion justifies entry into the vehicle to search for proof of ownership in those areas where it might be found. The minority view that probable cause is necessary before a *limited* search for registration papers is justified is contrary to the decisions of this Court, federal circuit courts of appeal, and other states. *See Class*, 475 U.S. at 118–19; *Miller*, 84 F.3d at 1251; *Jackson*, 142 Cal.Rptr. at 302–03; *Boykins*, 232 A.2d at 143; *Reyes*, 499 N.Y.S.2d at 323; *Byrd*, 209 S.E.2d at 517; *Halstead*, 414 A.2d at 1149 n.14.

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (quoting *Martinez-Fuerte*, 428 U.S. at 544). If this Court permits the minority standard adopted by the Arizona Court of Appeals to stand, which requires officers on the street to assess other factors indicating probable cause that the vehicle in question was either stolen or involved in other criminal activity, then the long-standing clear rule of law that has become routine practice will be altered with unworkable ambiguity. An officer confronted with a non-compliant motorist is alone and without the ability to call a magistrate. Such an officer has a reasonable belief to search for the registration solely upon the failure of a motorist to provide it upon request.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court grant the petition for writ of certiorari to resolve the conflict between the minority view adopted by Arizona that probable cause is required before conducting a *limited* search for registration papers and the majority view that failure to produce registration creates reasonable suspicion that the vehicle may be stolen and justifies a limited search of the vehicle in those areas where the registration might be found.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JACQUELYN B. ESKAY
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONER

CRM97-0312
16294

APPENDICES

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	1 CA-CR 97-0246
Appellee,	)	
	)	DEPARTMENT A
V.	)	
	)	O P I N I O N
WILLIAM LEE BRANHAM,	)	
	)	Filed 12-23-97
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 96-90862

The Honorable Cheryl K. Hendrix, Judge

REMANDED WITH INSTRUCTIONS

—

Grant Woods, Attorney General
By Paul J. McMurdie, Chief Counsel
Criminal Appeals Section
and
Ginger Jarvis
Assistant Attorney General
Attorneys for Appellee — Phoenix

Dean W. Trebesch, Maricopa County Public Defender
By Lawrence S. Matthew, Deputy Public Defender
Attorneys for Appellant — Phoenix

WEISBERG, Judge

William Lee Branham ("defendant") appeals from his conviction on one count of possession of dangerous drugs. We must decide whether a police officer making a legitimate traffic stop may conduct a limited search for the vehicle registration card based solely on the driver's failure to produce it. Because we hold that such a search is not permissible under the Fourth Amendment, we remand with instructions.

Facts and Procedural History

Officer Johnson stopped defendant for speeding. Upon the officer's request, defendant tendered his driver's license, but indicated that he had recently cleaned out his car and left the vehicle registration at home. After twice instructing defendant to search for the registration, Officer Johnson ordered defendant and his wife to step out of the car so he could search it himself. The officer testified that defendant said "okay."

Officer Johnson later testified that the failure to produce the vehicle registration, by itself, justified his limited search and that he had no other basis for searching the car. He indicated that he conducted similar searches in approximately eighty-five percent of those cases in which a driver could not produce registration.

During his limited search, Officer Johnson found some methamphetamine and drug paraphernalia. Based on this evidence, defendant was charged with possession of dangerous drugs. Defendant filed a motion to suppress, which was denied by the trial court. After his conviction by a jury, defendant timely filed this appeal.

Discussion

Generally, a search without a warrant is per se unreasonable and in violation of the Fourth Amendment. See *State v. Castaneda*, 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986). Several exceptions to the warrant requirement exist, however, and the state argued that two of these applied: the automobile exception and consent.

A. Automobile Exception

When the trial court denied defendant's motion to suppress, it made the following observation:

> It seems to me that if I went and stole a car and then got stopped for speeding while driving that car and the police officer asked me for driver's license, registration and insurance, I might give him my driver's license, but I wouldn't show him the registration and insurance because it's going to show somebody else's names that I've never heard of before. Therefore, the rule of law that says a police officer can conduct a limited search for the purpose of finding evidence of registration is reasonable, and it appears that that's exactly what Officer Johnson did in this case. I find no abuse of process.

The rule of law to which the trial court referred is found in *State v. Taras*, 19 Ariz. App. 7, 504 P.2d 548 (1972). In *Taras*, officers spotted a car parked in a desert area where stolen cars were often abandoned. When they slowly approached the car in a police vehicle, Taras drove off rapidly into the desert without turning on the headlights. The police pursued and, after a short distance, Taras abandoned the car and fled on foot. The officers apprehended Taras after a brief chase. Taras told the officers that the car belonged to him and that the registration was not in it. One of the officers got into the vehicle and searched the dashboard and visor area for the registration, and found some marijuana and drug paraphernalia. *Id.* at 8-9, 504 P.2d at 549-50.

Taras moved to suppress the marijuana and paraphernalia as fruit of an illegal search. The *Taras* court held that the search was reasonable under the circumstances. See *Id.* at 10, 504 P.2d at 552. The court noted that it was obvious that Taras had wished to avoid the police. See *Id.* at 11, 504 P.2d at 553. Furthermore, the car was found in a location known by officers to be a place where stolen cars were abandoned. The officers therefore suspected that the car was stolen, and the court held that "if a driver is unable to produce proof of registration, the officer may conduct a limited search of the car for evidence of automobile ownership." *Id.* This broad language appears to be the presumed rule of law upon which the trial court based its ruling and upon which the officer based his search.

The *Taras* court premised its decision on the automobile exception to the search warrant requirement as articulated in *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (search warrant unnecessary where there is probable cause to search automobile stopped on the highway). The United States Supreme Court indicated that, because of the particular mobility of a car, an exception to the general warrant requirement exists so long as

officers have probable cause to believe there is evidence "that the officers are entitled to seize." *Id.* at 48.

In *Taras*, the court specifically listed the facts that supported the officers' belief that the car might have been stolen: (1) the car was parked in an area where stolen cars were typically abandoned, (2) *Taras* tried to elude the police, and (3) Taras could not produce registration of the vehicle. See *Id.* at 10-11, 504 P.2d at 552-53. On its facts, therefore, *Taras* simply applied *Chambers* and held that, under all of the circumstances, including the failure to produce registration, the officers had probable cause to believe that the car was stolen. *Id.*

Other cases have reached the same conclusion on similar facts. See *State v. Acosta*, 166 Ariz. 254, 801 P.2d 489 (App. 1990); *English-Clark v. City of Tucson*, 142 Ariz. 522, 525, 690 P.2d 1235, 1238 (App. 1984). In *Acosta*, the state attempted to justify a search of a car on the basis that the driver failed to produce proof of ownership. See *Id.* at 258, 801 P.2d at 493. But, as in Taras, there were other factors that supported the search, specifically, that the driver did not have a driver's license and that he did not know the name of either the car's owner or the person who had loaned it to him. See *Id.* Considering these facts, this court concluded that the "officer certainly could have a reasonable suspicion that the car was stolen. . . ." *Id.* The determinative fact, again, was whether there was probable cause to believe that the car was stolen.

In *English-Clark*, a police officer observed a truck towing a trailer without turn signals or brake lights. The driver resisted the officer's attempts to stop the truck and, after the truck was finally halted, acted in a disruptive and obscene manner. When the officer approached the truck, he observed a shotgun, shotgun shells, and drugs on the seat. The driver, who could not produce the truck's registration, explained that the truck belonged to his mother. The driver was then placed under arrest for fleeing from a law enforcement vehicle. After searching the truck, the officer found more guns and drugs. The *English-Clark* court cited *Taras* and concluded that all of the facts, including the failure to produce the registration, gave the officer "the articulable facts necessary to justify a search of the truck." *Id.* at 525, 690 P.2d at 1238. Although not expressly set forth, these facts clearly provided probable cause to believe that the truck was stolen and that the persons in the truck illegally possessed drugs and guns.

In each of these cases, there was probable cause to believe that the vehicle was stolen, in part based upon the driver's failure to produce registration. In the instant case, the search was based solely on the driver's failure to produce proof of registration. The officer even testified that he had no reason to believe that defendant's car was stolen and that he did not need such evidence; instead, the search was pursuant to his policy to search most vehicles when the drivers could not produce registration.

Defendant relies on *People v. Superior Court*, 496 P.2d 1205 (Cal. 1972). On facts similar to the instant case, the California trial court granted a motion to suppress and the state appealed. The California Supreme Court analyzed the failure to produce registration as follows:

> It would not be unreasonable for a thief to remove or destroy the registration card of an automobile he has taken; his purpose in so doing might be to prevent the true owner from being traced, to eliminate the discrepancy between the owner's name and his own, or to facilitate substitution of a forged card. . . . [I]t is also true that being a stranger to the vehicle he might not be able to present the card to an officer simply because he did not know where to find it. [496 P.2d at 1210.]

This is the same reasoning that the trial court applied in the instant case to find that the search was justified. But the California Supreme Court went on in its analysis to note that the failure to produce the registration card "could equally well be entirely innocent." *Id.* at 1210. The court provided such examples as when a person renews or transfers registration, requiring its removal from the car, or when a driver might innocently be unable to locate the registration. *Id.* The court concluded that the failure to produce registration, without more, does not provide probable cause to believe that a car has been stolen.

In *State v. Valenzuela*, 121 Ariz. 274, 589 P.2d 1306 (1979), this analysis was applied by the Arizona Supreme Court to another type of search. In that case, an officer searched a person who was standing in a group because the officer had smelled a strong odor of marijuana. The Valenzuela court cited *People v. Superior Court* for the proposition that, because the presence of marijuana odor is equally consistent with innocent behavior on Valenzuela's part (other persons were present who could have possessed the marijuana), the odor, by itself, did not provide probable cause to search him. The court went on to note that additional factors,

specifically Valenzuela's dishonest answers about the contents of his pockets and other facts, in combination with the smell of marijuana, did provide probable cause. *Valenzuela*, 121 Ariz. at 276, 589 P.2d at 1308.

Applying the *Valenzuela* reasoning to the instant case, we reach the same result as the court in *People v. Superior Court*. The failure to produce registration is not a criminal offense. Ariz. Rev. Stat. Ann. § 28-305(F. Supp. 1997) (requiring registration card to be carried in car), § 28-181 (violation of chapter 3 is a civil traffic violation). As a result, the failure to produce registration is equally consistent with innocent behavior. Therefore, such failure, by itself, does not provide probable cause to believe that a car is stolen and does not permit the limited search conducted here.

This decision does not mean that failure to produce registration is irrelevant in all cases. As *People v. Superior Court, Taras, Acosta,* and *English-Clark* all conclude, other facts, in combination with the failure to provide registration, may provide probable cause to believe that a car is stolen, or is involved in some other criminal activity. We hold that because the state did not provide any additional evidence that the vehicle in this case might be stolen or involved in some other criminal activity, the search was not supported by probable cause under the automobile exception.

B. Consent

The state also argues that defendant consented to the search. The record, however, indicates that the trial court did not rule on this fact-intensive question. See *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991). Because we find that the trial court's basis for denying the motion to suppress was incorrect, we remand the case for consideration of whether the state provided clear and positive evidence that consent to search was freely and voluntarily given. See *Id.*

Conclusion

For the foregoing reasons, we vacate the trial court's order denying defendant's motion to suppress. Notwithstanding, we remand the case for consideration of whether a valid consent justified the search and such other further proceedings as are consistent with this opinion.

Sheldon H. Weisberg, Judge

CONCURRING:

Sarah D. Grant
Presiding Judge

Ruth V. McGregor, Judge

SUPREME COURT

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 West Washington
Phoenix, Arizona 85007-3329

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

March 19, 1998 **Telephone: (602) 542-9396**

RE: STATE OF ARIZONA VS. WILLIAM LEE BRANHAM
Supreme Court No. CR-98-0067-PR
Court of Appeals No. 1 CA-CR 97-0246
Maricopa County No. CR 96-90862

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 17, 1998, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review = DENIED.

Justice McGregor did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 19th day of March, 1998

NOEL K. DESSAINT, Clerk

TO:
Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq. and Ginger Jarvis, Esq.
Dean W. Trebesch, Maricopa County Public Defender
Attn: Lawrence S. Matthew, Esq.
William L. Branham
Glen D. Clark, Clerk, Court of Appeals, Division One
Lexis-Nexis
West Publishing Company

dk

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Division 1
Court of Appeals
State of Arizona
Filed: Apr. 9, 1998

GLEN D. CLARK, CLERK

By: K. Scott

STATE OF ARIZONA,	)	1 CA-CR 97-0246
	)	
Appellee,	)	
	)	
v.	)	DEPARTMENT A
	)	
WILLIAM LEE BRANHAM,	)	MARICOPA County
	)	Superior Court
Appellant.	)	No. CR 96-90862
	)	

ORDER AND MANDATE

Grant Woods, The Attorney General
By: Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
Attorneys for Appellee — Phoenix

Dean W. Trebesch, Maricopa County Public Defender
By: Lawrence S. Matthew, Deputy Public Defender
Attorneys for Appellant — Phoenix

The opinion of this Court in the above matter was filed on December 23, 1997.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated March 17, 1998, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR 98-0067-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on April 9, 1998. A copy of the ORDER AND MANDATE and a copy of the opinion were mailed to the Honorable Cheryl K. Hendrix, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk by this Court in aid of the consideration of this matter.

DATED April 9, 1998.

_____
VICE CHIEF JUDGE

All of the foregoing directives were complied with April 9, 1998.

GLEN D. CLARK, Clerk
By

Karen Scott
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 9 1998
OFFICE OF THE CLERK

(2)

No. 97-2026

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF ARIZONA,

Petitioner,

-vs-

WILLIAM LEE BRANHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE S. MATTHEW
Deputy Public Defender
11 West Jefferson, Suite 5
Phoenix, Arizona 85003-2302
Telephone: (602) 506-8219

Attorney for *RESPONDENT*

---

27 pp

QUESTION PRESENTED

Is it unreasonable for police to conduct a warrantless search of the interior of a vehicle for the vehicle registration after a citizen is stopped for driving 45 mph in a 35 mph zone, and the citizen produces a valid drivers license and informs the officer he has left his registration at home, and there is no other indication that the citizen or vehicle is or has been involved in criminal activity?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii-iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	
I. This Court Should Not Take Jurisdiction of This Case Because the Proceedings Have Been Completed in State Court and the Case Has Been Dismissed With Prejudice	4
II. Contrary to the Claim of the Petitioner, the Decision of the Arizona Appellate Court is Not in Conflict With a Majority of Other State and Federal Jurisdictions	6
III. It is Unreasonable to Permit a Search of a Considerable Portion of the Interior of a Vehicle in the Absence of a Reasonable Belief that the Car is Stolen or Otherwise Involved in Criminal Activity	16
CONCLUSION	19
APPENDIX A	A-1

TABLE OF AUTHORITIES

Cases **Page**

California v. Stewart,
384 U.S. 436 (1966)..... 5

Camara v. Municipal Court,
387 U.S. 523 (1967)..... 16

Delaware v. Prouse,
440 U.S. 648 (1979)..... 16

Jackson v. Superior Court,
142 Cal. Rptr. 299 (Cal. 1977)..... 8

North Dakota Pharmacy Board v. Snyder's Stores,
414 U.S. 156 (1973)..... 4-5

New York v. Class,
475 U.S. 106 (1986).....4, 8, 16, 18

New York v. Quarles,
467 U.S. 649 (1981)..... 4

People v. Reyes,
499 N.Y.S.2d 321 (N.Y. Sup. Ct. 1986)..... 9

People v. Superior Court,
496 P.2d 1205 (Cal. 1972)..... 17

South Dakota v. Opperman,
428 U.S. 364 (1976)..... 10

State v. Barrett,
406 A.2d 198 (N.J. Super. 1979)..... 14

State v. Boykins,
232 A.2d 141 (N.J. 1967)..... 11, 12

State v. Byrd,
209 S.E.2d 516 (App. N.C. 1974)..... 15

State v. Halstead,
414 A.2d 1138 (R.I. 1980)..... 10

State v. Patino,
414 A.2d 1327 (N.J. 1980)..... 13

Terry v. Ohio,
392 U.S. 1 (1968)..... 18

United States v. Miller,
84 F.3d 1244 (10th Cir. 1996)..... 7

Constitutional Provisions

U.S. Const. Amend IV.....4, 10, 16, 18, 19

Rules

Rule 16.6(d), Arizona Rules of Criminal Procedure..... 5

Other Authorities

La Fave, *Search and Seizure,* § 7.4(d), (3d ed. 1996).... 17

OPINION BELOW

Respondent concurs with the Statement of the Opinion Below as set forth in the Petitioner's petition.

JURISDICTION

Respondent concurs with the statement of Jurisdiction insofar as it sets forth the proper time limitations, constitutional provisions, statutory provisions, and rules. Respondent disagrees, however, that this Court has Jurisdiction to review the decision of the Arizona Court in that although the petition was timely filed, it was filed after this case was concluded and dismissed with prejudice in the Arizona Courts. (*See,* Argument Section I, pages 4-5.).

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concurs with the Statement of Constitutional Provisions Involved as set forth in the Petitioner's petition.

STATEMENT OF THE CASE

A police officer, Johnson, observed a vehicle traveling 45 miles per hour in a 35 mile per hour zone. Johnson activated his emergency lights and the vehicle, driven by Respondent Branham, immediately pulled to the side of the road.

Johnson contacted Branham, who identified himself by producing a valid Arizona drivers license. Branham was unable to produce his registration because, as he told Johnson, he had recently cleaned out his car and left the registration on the counter at home. Nonetheless, Johnson twice ordered Branham to search for the registration.

Despite the fact that Johnson could have confirmed ownership of the vehicle, as he testified, by using his radio to check with the Department of Motor Vehicles, Johnson decided to conduct his own search of the vehicle for the registration. Johnson testified that his decision to search was based on nothing more than a whim and for his own training and to keep updated. Johnson then told Branham he would enter the vehicle to conduct a search. Johnson never asked for permission to search.

Johnson began his search at the console area of the car. Johnson claimed he noticed large hole in the top part of a piece

of plastic around the gearbox and that papers were jammed in the hole. He said he could see past these papers into the hole where he claims he saw scales and a vial. Inside the vial was a substance later identified as Methamphetamine.

Branham had only owned the vehicle for six months prior to the day he was stopped. He purchased the vehicle out of the newspaper from an individual he did not know personally. He denied there was a hole in the gearbox when he was stopped by Johnson.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Take Jurisdiction of This Case Because the Proceedings Have Been Completed in State Court and the Case Has Been Dismissed With Prejudice.

This is a case where a Fourth Amendment federal question was resolved in the state appellate courts, but the case was remanded for further proceedings in the state superior court. The appellate court found that the search of Branham's vehicle was unconstitutional. The question on remand was whether Branham had consented to the search of his vehicle. This question was answered in the negative by the trial judge. (*See,* Appendix A, Minute Order ruling that Branham did not consent to the search). At the conclusion of the evidentiary hearing, following remand, the judge dismissed this case *with prejudice*, with no objection to the dismissal by the state. (*Id.*).

Branham recognizes that this Court has accepted review of cases where there was a remand for further proceedings on other issues following an appellate ruling on a federal question. Branham submits, however, that this Court accepted review of those cases ***prior to completion*** of the proceedings in state courts. *See, e.g., New York v. Quarles,* 467 U.S. 649, 651 n.1 (1984); *North Dakota Pharmacy Board v. Snyder's Stores,* 414

U.S. 156, 159-64, (1973); *California v. Stewart,* 384 U.S. 436, 498 n.71 (1966).

Here, the proceedings in State Court concluded *before* the petition for certiorari was filed. Moreover, the proceedings for the instant case were dismissed *with prejudice* by the state court without objection by the state *before* the petition for certiorari was filed.[1] A dismissal with prejudice bars further prosecution of an accused. *Rule 16.6(d), Arizona Rules of Criminal Procedure.*

Branham submits that he can no longer be prosecuted due to the dismissal with prejudice and that this Court should not entertain jurisdiction of a case where proceedings have reached a final, irrevocable, conclusion in state court.

This Court should also take into consideration the disruption to Respondent Branham's life and the anxiety that has resulted from the state pursuing this matter after a dismissal with prejudice has been entered by the Superior Court of Arizona. A dismissal with prejudice should be just that -- a *final* conclusion of the proceedings.

---

1 The dismissal with prejudice was entered on May 28, 1998. It was not appealed. The Petition for Certiorari was not filed until mid-June, 1998.

II. Contrary to the Claim of the Petitioner, the Decision of the Arizona Appellate Court is Not in Conflict With a Majority of Other State and Federal Jurisdictions.

The Petitioner attempts to make the petition for certiorari cert-worthy by claiming there is a vast conflict between state and federal courts regarding the issue presented. A review of the decisions relied upon by the petitioner belies this assertion. Six of the cases relied upon by the State of Arizona offer no support whatsoever. Only one case supports the petitioner.

A. *New York v. Class*.

One of the reasons many of the cases relied upon by petitioner offer no support is because the petitioner reads the *Branham* decision too broadly. The petitioner would have this Court believe that *Branham* conflicts with this Court's decision in *New York v. Class*, 475 U.S. 106 (1986). Such is not the case.

Class dealt with an officer reaching into a vehicle to move papers on the dashboard which covered the vehicle identification number (VIN). This Court specifically limited its holding to whether there was a reasonable expectation of privacy in the VIN number. *Id.* at 107. Slightly rearranging papers obstructing the VIN is considerably different than

entering a vehicle to search under the seat, around the seat, in the side door pouches, above and under the visors, in and around the console, in and around the seats, between the seats, in and around the glove compartment, and in any other place that registration papers might be found. *Branham* is not in conflict.

B. The Lone Federal Case.

Petitioner claims the decision in *Branham* conflicts with the Tenth Circuit's holding in *United States v. Miller*, 84 F.3d 1244 (10th Cir. 1996). This is incorrect. In *Miller*, the driver was stopped for speeding Kansas. While the driver produced a valid Kansas drivers license, the vehicle he was driving had Missouri license plates, even though the driver said he purchased the vehicle in California. *Id.* at 1248. The driver further admitted that the vehicle had fictitious plates. On this basis, the officer copied the VIN from the door jam and the dash. *Id.* While talking to the passenger, the officer saw drug paraphernalia in plain view. The driver admitted it was his. The driver was arrested and an inventory search of the vehicle turned up drugs, drug paraphernalia, and weapons. *Id.* at 1249.

The passenger challenged the search on appeal. The sole question was whether the officer acted reasonably in obtaining the VIN. *Id.* at 1251. Relying on this Court's

decision in *New York v. Class*, 475 U.S. 106 (1986), the court ruled the actions of the officer reasonable.

The decision in *Miller* has no bearing on the decision in the instant case. It must be remembered that the question raised in the instant petition is the reasonableness of a search of all portions of a vehicle where registration may be found in situations where the citizen driving the vehicle is not suspected of criminal activity and has produced a valid drivers license. *Miller*, however, deals with an arrest of a driver due to criminal activity coupled with a limited search of the VIN of the vehicle.

C. The California Case.

The petitioner claims that *Jackson v. Superior Court*, 142 Cal. Rptr. 299 (Cal. 1977), is in conflict with the Arizona decision. If anything, *Jackson* supports the decision.

Jackson involved the stop of a vehicle for erratic driving. The driver appeared to be intoxicated and was arrested. The officer never asked the driver for registration. The vehicle was left along the side of the road. *Id.* at 300-01.

The officer began an inventory of the vehicle contents beginning by looking for the registration which was ultimately discovered under the visor. Before finding the registration, however, the officer found contraband in the glove compartment and under the seat. The driver moved to

suppress.

On appeal, the state argued that the officer had the right to enter the vehicle to look for the registration. The California appellate court disagreed:

> [The officer] may have assumed that the search for the registration was just standard procedure in the stopping of a vehicle -- a procedure which should be reassessed in the light of the alternative procedures, such as license checks per radio and other advanced technological developments that may be available.

Id. at 303.

The Court further held that even though California had a specific statute which authorized the search of vehicles for registration, *Id.* at 302 n.3, all officers had to first inquire as to the location of the registration before there would even be any possible grounds to look for it. *Id.* at 303.

The California Case generally supports the decision of the Arizona Court and it must be remembered that California, unlike Arizona, has a statute permitting a search for registration. Thus, the California decision is based primarily on state law and not on federal constitutional law.

D. The New York Case.

People v. Reyes, 499 N.Y.S.2d 321 (N.Y. Sup. Ct. 1986), like the federal case mentioned in subsection B, above,

is a VIN search case and does not have anything to do with the issue presented here.

In *Reyes,* the driver had been under police surveillance and confronted the officers who had been following him. The officers asked for license and registration but the driver could not produce them. A later check of the VIN on the underside of the vehicle revealed it was stolen. *Reyes* has no applicability to the *Branham* decision and the issue being presented here.

E. The Rhode Island Case.

In *State v. Halstead,* 414 A.2d 1138 (R.I. 1980), the police observed a rental truck at 4:30 a.m. in a high crime area traveling 15-20 mph below the speed limit. The occupants of the rental vehicle "gawked" at the police for an unusually long time. *Id.* at 1148. The officers pulled the truck over for a license and registration check. The driver could not produce a valid registration and scuffled with the police. He was arrested. The vehicle was seized for impoundment. The police began to inventory the contents of the vehicle. *Id.* at 1149.

On the basis of *South Dakota v. Opperman,* 428 U.S. 364 (1976), the Rhode Island Supreme Court found the actions of the police to be in compliance with the Fourth Amendment. *Halstead,* 414 A.2d at 1148. The *Halstead* Court made a passing reference, in a footnote, to the decision of the New

Jersey Supreme Court in *State v. Boykins*, 232 A.2d 141 (1967), but did not base its decision on that case.

Moreover, it is interesting to note that prior to the search, the trial court in *Halstead* ruled that the conduct of the occupants of the vehicle created a reasonable suspicion that the vehicle or its occupants were involved in criminal activity. *See*, 414 A.2d at 1149 n. 14. On this basis, ruled the trial court, the officers were justified in the search of the truck. This is the same type of reasoning adopted by the Arizona Court in the *Branham* decision.

Halstead does not apply to the issue presented since the Rhode Island Court's decision as to the validity of the search was based on legal principles promulgated by this Court in the *Opperman* decision.

F. New Jersey - *State v. Boykins*.

As with the California case in Subsection C, above, this case also supports the decision of the Arizona Appellate Court. Contrary to the petitioner's claim, this case does not stand for the proposition that "failure to produce proof of registration justified officer's search for evidence of ownership." (Petition at 7). In fact, *Boykins* clearly stands for the proposition stated by the Arizona Court of Appeals: When facts are presented which provide a basis for believing a vehicle is stolen or

involved in some other criminal activity, a search of the car for relevant information is permissible.

State v. Boykins, 232 A.2d 141 (N.J. 1967), involved officers observing a vehicle speeding and driving in a reckless manner. The officers came along side the car and told it to pull over. The driver said he would. Instead of pulling over, however, the driver "'took off with his wheels screeching,' swerving toward the police car in an effort to hit it." *Id.* at 142. The car led the police on a chase, nearly hitting pedestrians. When it stopped, various occupants fled the car. A search of the car revealed weapons and drugs. *Id.*

The trial court suppressed the evidence holding that there was no permissible basis for the search since the suspects were in custody at the time of the search. *Id.* In finding otherwise, the Supreme Court of New Jersey held:

> [T]he search was valid on another basis. *The facts recited above plainly suggest the driver and his passengers or one or more of them were involved in some substantial criminal affair.*
>
> * * *
>
> Such behavior strongly suggests a probability that the occupants had on their persons or in the car contraband or instruments or the fruit of crime. It seems to us that in such circumstances the public interest requires that the men and the vehicle be searched. . . .

Id. at 143 (emphasis added).

As this language reveals, *Boykins* does not support petitioner's claim. The part of *Boykins* relied upon by petitioner is *dicta* and unrelated to the holding or analysis of *Boykins.*

G. New Jersey - *State v. Patino*.

Again, as with many of the cases relied upon by petitioner, this case also supports the decision of the Arizona Court of Appeals. *State v. Patino,* 414 A.2d 1327 (N. J. 1980), deals with a stop of a vehicle under the now unconstitutional practice of a license and registration check. As the officer approached the vehicle, he saw the passenger give the driver the registration and insurance documentation. While speaking to the occupants, the officer saw marijuana in a container in plain view. *Id.* at 1329. The occupants were arrested on the basis of the drugs and a search of the vehicle was conducted incident to a lawful arrest. In the trunk of the vehicle was found cocaine. *Id.*

On appeal, the New Jersey Supreme Court held that the search of the front of the vehicle was lawful as incident to the arrest. *Id.* at 1330. The court, however, found the search of the trunk to be unreasonable because the suspects had no access to the trunk. *Id.* at 1331.

It is only in *dicta* that the court makes passing reference to an earlier case where a lower court in *State v. Barrett,* 406 A.2d 198 (N.J. Super. 1979), ruled it was permissible to search a glove compartment for vehicle registration. *Patino,* 414 A.2d at 1332. A review of the *Barrett* case, however, shows that preceding the search for the vehicle registration in that case, the accused had been spotted in the rear of a restaurant engaged in suspicious activity (e.g., rummaging through another vehicle, turning off lights while driving). 406 A.2d at 212.

It was on these facts that the *Barrett* court found it permissible to search for registration. This is no different than the situation confronted by the Arizona Court of Appeals. As in the *Branham* decision, the search in *Barrett* was justified due to factors which gave rise to a belief that the vehicle was involved in criminal activity. The *Patino* decision does not support the position of the petitioner.

H. <u>The North Carolina Case</u>.

This is the only case which supports the petitioner's position, i.e., that it is lawful and reasonable to search a citizen's vehicle for registration when the citizen fails to present proof of ownership and there is no indication whatsoever that the vehicle or citizen has been involved in criminal activity.

In *State v. Byrd*, 209 S.E.2d 516 (App. N.C. 1974), the Court of Appeals of North Carolina was presented with a search which followed the now unconstitutional practice of stopping vehicles for license and registration checks. When the driver failed to produce registration for the vehicle, the police searched the car and found a gun in the glove compartment. The appellate court ruled this search was constitutional. *Id.* at 517. It should be noted however, that the case was never appealed to the highest court of North Carolina and therefore does not represent a final resolution of the issue for that state. Thus, there is no conflict between jurisdictions as a result of the *Byrd* decision.

III. It is Unreasonable to Permit a Search of a Considerable Portion of the Interior of a Vehicle in the Absence of a Reasonable Belief that the Car is Stolen or Otherwise Involved in Criminal Activity.

A citizen does not surrender the protections of the Fourth Amendment by entering an automobile. *Delaware v. Prouse,* 440 U.S. 648, 663 (1979). The interior of a car is subject to Fourth Amendment protections from unreasonable searches by the police. *New York v. Class,* 475 U.S. 106, 114-15 (1986).

This Court has noted that in determining the reasonableness of a search, the only test which may be applied is the balancing of "'the need to search against the invasion which the search entails.'" *Id.* at 116, *quoting, Camara v. Municipal Court,* 387 U.S. 523, 534-35 (1967).

In this petition, the petitioner seeks to have this Court adopt as law the rule that, in the absence of any indication that the vehicle is stolen or the driver involved in criminal activity, a person stopped for speeding who produces a valid drivers license but no registration may have their car's interior searched for registration in all places where the registration might be found.

As the Arizona Court of Appeals noted in the *Branham*

decision, and as the California Supreme Court noted in *People v. Superior Court,* 496 P.2d 1205, 1210 (1972), the inability to produce registration -- in the absence of any other factors -- is consistent with innocent behavior.

On the basis of this innocent behavior -- and nothing else -- the petitioner urges this Court to sanction searches of the following portions of the interior of a vehicle: under the seats, around the seats, the side door pouches, above and under the visors, the dash, in and around the console, in and around the seats, between the seats, in and around the glove compartment, and any other place that the registration might reasonably be found. As Professor La Fave notes in his treatise on search and seizure, *"This is significant in that a search for this purpose may at least sometimes be more intrusive than would likely be permitted in an ordinary inventory of the contents [of the vehicle.]*" La Fave, Search and Seizure § 7.4(d) at 567 (3d ed. 1996). (Emphasis added).

Thus, in applying the second portion of the balancing test, above, the search sought to be allowed by the petitioner is exceptionally intrusive, and sometimes more intrusive than an inventory search.

As to the first portion of the test, the need to search, the need is minimal. To begin, an officer may check the VIN to

determine ownership. Second, the officer may determine ownership through the license plate on the vehicle. In each instance, the officer has electronic means available to determine ownership. The need to search is nonexistent.

Applying the balancing test promulgated by this Court results in the following if the petitioner's position is accepted: an exceptionally intrusive search where the need to search is nonexistent. Respondent submits that the petitioner's position violates the Fourth Amendment.

As to the requirement set forth in the *Branham* decision that there be some sort of indication of criminal activity before a search is permissible, this Court has noted (when discussing the reasonableness of a vehicle search):

> "'in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, justifiably warrant that intrusion.'"

New York v. Class, 475 U.S. 106, 116-17 (1986), *quoting, Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The *Branham* decision is consistent with the Fourth Amendment principles promulgated by this Court. The petition for certiorari should be denied.

Conclusion

The decision of the Arizona Court of Appeals in *Branham* is entirely consistent with Fourth Amendment principles promulgated by this Court in previous decisions. If this Court were to adopt the reasoning of the petitioner, innocent behavior by drivers (the lack of registration) would permit an excessively intrusive vehicle search even though officers have other means (VIN and license plates) to determine ownership of a vehicle.

Respectfully Submitted,

MARICOPA COUNTY PUBLIC DEFENDER

By: LAWRENCE S. MATTHEW
Deputy Public Defender
11 West Jefferson Ste. #5
Phoenix, Arizona 85003-2302
Telephone: (602) 506-8219
Counsel for *RESPONDENT*

APPENDIX

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

COPY

CLERK OF THE COURT
FORM R000A

May 28, 1998 HONORABLE JAMES H. KEPPEL B. Wessing
Deputy

No. CR 96-90862

Filed Jun 01 1998

STATE OF ARIZONA
County Attorney
James A. Rizer
By: David J. Flader

v.

WILLIAM LEE BRANHAM
Christine L. Israel, P.D.

10:50 a.m. This is the time set for hearing to consider oral argument re: Court of Appeals remand. State is represented by above-named counsel. Defendant is not present, but is represented by above-named counsel.

Court Reporter, Laurie Yazwa, is present.

The Court indicates it has read the transcript of Officer Johnson's testimony at an evidentiary hearing before Judge Hendrix on September 13, 1996. With regard to whether or not the Defendant had given his consent to search the vehicle in question, Officer Johnson stated, "I didn't ask him for consent." Said quote is taken from page 14 of the transcript.

Accordingly, the Court finds that the State has not provided clear and positive evidence that the consent to search was freely and voluntarily given by the Defendant in this case and the evidence seized is suppressed.

IT IS FURTHER ORDERED granting the Motion to Dismiss with Prejudice.

Pursuant to the granting of the Motion to Dismiss,

IT IS ORDERED vacating the judgement of conviction previously entered in this case and,

IT IS FURTHER ORDERED that any sums paid toward the fine imposed by the Court on March 11, 1997 shall be reimbursed to Mr. Branham.

10:55 a.m. Matter concludes.

FILED

JUL 20 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2026

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF ARIZONA,
PETITIONER,

-VS-

WILLIAM LEE BRANHAM,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

REPLY BRIEF

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JACQUELYN B. ESKAY
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Petitoner's question for review is stated fully in the Petition for Writ of Certiorari.

2. In reply, should this Court take jurisdiction of this case now that Petitioner's presumption that Respondent did not consent to the search of his car has been confirmed on remand?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD ISSUE

I

THIS COURT SHOULD TAKE JURISDICTION OF THIS CASE IN LIGHT OF THE FACT THAT THE ARIZONA TRIAL COURT HAS DETERMINED, UPON REMAND FOR AN EVIDENTIARY HEARING, THAT RESPONDENT DID NOT CONSENT TO A SEARCH OF HIS CAR 1

II

THE PETITION FOR WRIT OF CERTIORARI CLEARLY SUPPORTS PETITIONER'S CLAIM THAT ARIZONA HAS JOINED THE MINORITY OF JURISDICTIONS IN HOLDING THAT PROBABLE CAUSE IS NECESSARY BEFORE AN ARRESTING OFFICER CAN CONDUCT A LIMITED SEARCH OF AN AUTOMOBILE FOR PROOF OF OWNERSHIP 2

CONCLUSION 7

TABLE OF AUTHORITIES

CASES — PAGE

Delaware v. Prouse
440 U.S. 648 (1979) 3

Jackson v. Superior Court
142 Cal.Rptr. 299 (Cal. 1977) 3, 4

New York v. Class
475 U.S. 106 (1986 2

People v. Reyes
499 N.Y.S.2d 321 (N.Y. Sup. Ct. 1983) 4

State v. Boykins
232 A.2d 141 (N.J. 1967) 4, 5, 6

State v. Barrett
N.J. Super. 211, 406 A.2d 198 (Law.Div. 1979) 5

State v. Byrd
209 S.E.2d 516 (N.C. App. 1974) 5, 6

State v. Halstead
414 A.2d 1138 (R.I. 1980) 4

State v. Holmgren
659 A.2d 939 (N.J. Super. Ct. App. Div. 1995) 5

State v. Jones
195 N.J.Super. 119, 478 A.2d 424 (App.Div. 1984) 5

State v. Patino
83 N.J. 1, 414 A.2d 1327 (1980) 5

United States v. Lopez
474 F. Supp. 943 (C.D. Cal. 1979) 3

United States v. Miller
84 F.3d 1244 (10th Cir. 1996) 3

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 4, 5, 6

STATEMENT OF THE CASE

Petitioner will not reiterate the factual and procedural history of the case, and instead will rely on the statement of the case as set out in the Petition for Writ of Certiorari.

REASON WHY THE WRIT SHOULD ISSUE

I. THIS COURT SHOULD TAKE JURISDICTION OF THIS CASE IN LIGHT OF THE FACT THAT THE ARIZONA TRIAL COURT HAS DETERMINED, UPON REMAND FOR AN EVIDENTIARY HEARING, THAT RESPONDENT DID NOT CONSENT TO A SEARCH OF HIS CAR.

Respondent attempts to mislead this Court into thinking that the issue raised in the Petition for Writ of Certiorari has been rendered moot because the Arizona trial court, upon remand for an evidentiary hearing, has determined that Respondent did not consent to a search of the vehicle. Indeed, the trial court, on remand, merely confirmed what Petitioner has presumed in the petition. The issue raised by Petitioner is clearly stated as follows:

> Did the Arizona Court of Appeals err, as a matter of federal constitutional law, in holding that an arresting officer, who has stopped a driver for a traffic violation, is not justified in conducting a *restricted or limited search* for proof of ownership of the vehicle unless the driver's failure to produce proof of ownership is coupled with other factors giving rise to probable cause that the vehicle is stolen or involved in some other criminal activity?

(Petition, at i.) This issue necessarily presumes that Respondent did not give consent to search the car. In particular, the issue is whether it is reasonable for an officer to enter a vehicle to conduct a limited search for registration after making reasonable attempts to procure registration, including an inquiry as to the whereabouts of the registration prior to entry. (Petition, at 7.) The fact that the Arizona

trial court determined that consent was not given in this case strengthens Petitioner's argument and makes the issue *more* cert-worthy.

The reversal of Respondent's conviction has created a grave threat to the enforcement of Arizona's vehicle registration laws. For the reasons here and in the Petition for Writ of Certiorari, this Court should take jurisdiction of the case.

II. THE PETITION FOR WRIT OF CERTIORARI CLEARLY SUPPORTS PETITIONER'S CLAIM THAT ARIZONA HAS JOINED THE MINORITY OF JURISDICTIONS IN HOLDING THAT PROBABLE CAUSE IS NECESSARY BEFORE AN ARRESTING OFFICER CAN CONDUCT A LIMITED SEARCH OF AN AUTOMOBILE FOR PROOF OF OWNERSHIP.

Petitioner has presented a cert-worthy issue in its Petition for Writ of Certiorari. Arizona has joined the minority in holding that an arresting officer may not conduct a *limited or restricted* search of an automobile when the driver has failed to produce registration. The majority rule, as stated in the Petition, was enunciated in *State v. Boykins*, 232 A.2d 141, 143 (N.J. 1967), failure to produce proof of registration justifies an officer's search for evidence of ownership.

A. *New York v. Class.*

This Court in *Class* quite clearly stated that a demand to *inspect* for registration papers is within the scope of police authority pursuant to a valid traffic stop. 475 U.S. 106, 115 (1986). Respondent correctly notes that *Class* involved the inspection of an automobile VIN, but the Court in reaching its conclusion relied on the authority of officers to inspect for licenses and registration. 475 U.S. at 115–16.

More importantly, this Court emphasized that such a *limited* search is permissible because "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective." *Id.* at 118. *Class* is an important case. The failure to provide the necessary documents (VIN, license, registration, etc.)

justifies a regulatory search. The reasoning is the public's vital interest in ensuring that only those qualified to do so are permitted to operate automobiles, that these automobiles are fit for safe operation, and that licensing, registration, and vehicle inspection requirements are being observed. *See Delaware v. Prouse*, 440 U.S. 648, 658 (1979).

B. Federal cases.

The federal courts have also joined the majority view enunciated in *Class*. Although *Class* involves VINs, this Court clearly indicated that the limited search exception applies to searches for licenses and registration. 475 U.S. at 115–16. The federal circuit courts have also adopted this rationale, as explained in *United States v. Miller*, 84 F.3d 1244, 1250 (10th Cir. 1996). Failure to provide proof of registration provides reasonable suspicion to the arresting officer that the vehicle might be stolen. *Class*, 475 U.S. at 114—16; *Miller*, 84 F.3d at 1250; *Boykins*, 232 A.2d at 143. It is this failure to provide proof of registration that gives rise to reasonable suspicion, which in turn justifies the officer's limited search, whether it be for a VIN, license, or registration. *See Miller*. 84 F.3d at 1250–51.

C. California cases.

Respondent mischaracterizes the holding in *Jackson v. Superior Court*, 142 Cal.Rptr. 299 (Cal. 1977), which clearly follows the majority view in holding that an officer may enter a vehicle to check on registration after first inquiring as to the location of the registration before entering to obtain it. *Jackson* requires that a reasonable attempt be made to procure registration before an unconsented entry can be sanctioned. 142 Cal.Rptr. at 302–03. The court determined that what is reasonable will, at a minimum, require an inquiry as to the whereabouts of the registration. *Id.* Further, the scope of the search must be limited to only those areas of the vehicle where the registration might be found. *Id.* California's majority view is explained by the United States District Court's opinion in *United States v. Lopez*, 474 F. Supp. 943, 948 (C.D. Cal. 1979). California follows the majority view: where, after inquiry, a driver fails to produce a valid registration, an officer may conduct a limited search

of the automobile in those areas where the registration might be found. *See Jackson*, 142 Cal.Rptr. at 302-03.

Contrary to Respondent's argument, *Jackson* does not stand for the minority rule set out in *Branham* that other factors must exist that give rise to probable cause to search the automobile. *Jackson* only requires a reasonable attempt to procure registration before conducting a limited search—the majority rule.

Furthermore, Respondent's assertion that *Jackson* involved only a state question regarding interpretation of a state statute is meritless. The underlying question regarding the issue raised here is when a state has a statute regarding regulation of a vehicle, and a driver fails to produce registration, is that failure to produce the required papers enough to permit a limited search for the documents under the Fourth Amendment? The statute regulating automobiles must exist before the issue can arise. Without the statute, the officer has no means to request the documents.

D. New York.

New York also follows the majority view. *People v. Reyes*, 499 N.Y.S.2d 321 (N.Y. Sup. Ct. 1983). The New York courts acknowledge that probable cause to search an automobile does not arise merely because the driver does not carry the proper documentation. *Reyes*, 499 N.Y.S.2d. at 323. However, New York does recognize that failure to comply with the rules governing ownership of automobiles diminishes the expectation of privacy and gives the police a reasonable basis to further inspect the vehicle. *Id.* at 323-24. This is true whether proof of ownership is a VIN, license, or registration. *Id.* The court was careful to note that a full blown search would be unwarranted because, as the court stated earlier, probable cause does not exist. *Id.* However, a search that involves the least intrusive means of reliably verifying the automobile's ownership is permitted. *Id.*

E. Rhode Island.

Respondent also mischaracterizes the court's conclusions in *State v. Halstead*, 414 A.2d 1138 (R.I. 1980). The court in *Halstead*

relies on *State v. Boykins*, 232 A.2d 141 (1967), which is the landmark case holding that failure to produce proof of registration justifies an officer's search for evidence of ownership. In *Halstead*, the driver failed to produce valid registration. In concluding that the police officers did not violate the defendant's Fourth Amendment rights, the court concluded that a search for evidence of ownership was justified and cited to *Boykins* as authority for its conclusion. 414 A.2d at 1149 n.14.

F. New Jersey.

New Jersey is the seminal case for the majority view that failure to produce registration justifies an officer's search for evidence of ownership. *Boykins*, 232 A.2d at 143. Respondent's contention that New Jersey requires more than failure to provide proof of registration before a limited search is permitted is wrong:

> The proper scope of a police search for automobile credentials after a traffic stop is found in *State v. Jones*, 195 N.J.Super. 119, 122–23, 478 A.2d 424 (App.Div. 1984):
>
> > [W]here there has been a traffic violation and the operator of the motor vehicle is unable to produce proof of registration, a police officer may search the car for evidence of ownership. However, . . . a search for evidence of ownership must be "confined to the glove compartment or other area where a registration might normally be kept in a vehicle. . . ." [quoting *State v. Patino*, 83 N.J. 1, 12, 414 A.2d 1327 (1980) (quoting *State v. Barrett*, N.J.Super. 211, 215, 406 A.2d 198 (Law.Div. 1979)).]

State v. Holmgren, 659 A.2d 939, 940 (N.J. Super. Ct. App. Div. 1995).

G. North Carolina.

Respondent correctly points out that North Carolina also follows the majority position espoused by Petitioner. *See State v. Byrd*, 209 S.E.2d 516 (N.C. App. 1974) ("[a] traffic violation as such will justify a search for things related to it. So . . . if the operator is unable to produce proof of registration, the officer may search the car for evidence of ownership. . . .").

It is important to note that *Byrd* relied exclusively on *Boykins*, and quoted from *Boykins*. *Byrd*, 209 S.E.2d at 516. This undermines Respondent's argument that New Jersey does not follow the rule espoused by Petitioner. Thus, both *Boykins* and *Byrd* hold that an officer is justified in conducting a limited search for proof of ownership when a driver fails to produce a valid registration. *Boykins*, 232 A.2d at 143; *Byrd*, 209 S.E.2d at 516. This is the majority rule and Arizona has strayed from this rule.

Moreover, Respondent alleges that *Byrd* is unpersuasive because it is a court of appeals case. The case was, however, petitioned to the state's highest court, and the North Carolina Supreme Court declined the opportunity to review the case. *State v. Byrd*, 212 S.E.2d 167 (writ of certiorari to review decision denied). Therefore, *Byrd* sets forth the law of North Carolina.

H. The majority rule is better reasoned than the minority rule.

Police officers are justified in conducting a limited or restricted search of a vehicle for proof of ownership after a valid traffic stop and if the driver fails to produce valid registration papers. The intrusion is *de minimis* in light of the fact that the motorist is already lawfully stopped for a traffic violation and is required by law to provide the necessary documents. This is not the type of intrusion that the Fourth Amendment intended to restrict. This procedure should be deemed a "routine administrative inspection" rather than a search subject to constitutional scrutiny. The Arizona Court of Appeals' decision in *Branham* deviates from the majority rule. Petitioner asks this Court to clarify an important question of Fourth Amendment jurisprudence, and, perhaps more importantly, to allow

state law enforcement officials to enforce their state's vehicle registration requirements.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JACQUELYN B. ESKAY
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONER

CRM97-0312
17218